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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1268

PATRICIA HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, et al.,

Petitioners,

v.

CORA McRAE, et al.,

Respondents.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A.

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THE INTEREST OF THE AMICUS[1/]

The National Council of Churches in the U.S.A. is the cooperative agency of thirty-two national religious denominations with an aggregate membership of over 40,000,000 in the United States. These several bodies are sharply divided in their views on the moral significance of abortion, notwithstanding which their representatives on the Governing Board of the National Council in 1977 adopted a resolution which stated:

> Whereas the National Council of Churches in 1963 unanimously adopted a Policy Statement on Human Rights which asserts in part, "Among the rights that are due to all persons without discrimination as to creed, race, color, sex, birth, nationality or economic status" is the political and civil right "to receive such benefits of social welfare, health, community or other services as are provided by governments at all levels;" and
>
> Whereas the Supreme Court of the United States in its 1973 decision Roe v. Wade and Doe v. Bolton guaranteed the legal right of women to obtain an abortion; and. . .
>
> Whereas legislation in Congress in effect denies that legal right to poor women by restricting public

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[1/] The attorneys for all parties have consented to the filing of this brief by amicus curiae. The letters requesting this consent will be forwarded to the Court immediately upon receipt by amicus.

funding for abortion [the "Hyde Amendments"];

Therefore, be it resolved that the National Council of Churches' Governing Board, even though it has no policy on abortion as such:

- reaffirms its support of the principle that a right guaranteed to all by law must not be denied to any because of economic status;

- urges the President, Congress and state legislatures to guarantee equal access to legal rights, including legal abortions, by ensuring adequate public funding. . . .

In the Same Policy Statement on HUMAN RIGHTS referred to in the resolution, the National Council of Churches had expressed its support for every person's right "to enjoy privacy," a right asserted two years before Griswold v. Connecticut, 381 U.S. 479 (1965), and ten years before Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410, U.S. 179 (1973).

The National Council of Churches has repeatedly enunciated its recognition of the high importance of religious liberty and of the right and duty of every person to obey the dictates of conscience.

> This social judgment accords with our Christian belief that conscience is the light given by God to every man to seek good and reject evil. In instances of conflict with human authorities, Christians have insisted, "We must obey God rather than man" (Acts 5:29). The Church, when it has been true to this insight, has nurtured and defended the right and duty of all men to obey God as each perceived His will in the leading of conscience.
>
> However, "conscience" is not a monopoly of Christians or of the religious traditions. Neither is there one kind of conscience that is "religious" and another that is "non-religious," but only the human conscience, which Christians see as God's gift, whether or not every individual so understands it.
>
> Policy Statement on Conscientious Objection to Military Service (February 23, 1967)

The National Council of Churches has also maintained since its inception in 1950, as did its predecessor, the Federal Council of Churches since 1908, the right and responsibility of churches (and of other religious -- and non-religious -- bodies) to speak out on issues of public policy and to attempt to effectuate through the democratic process what they believe to be the right moral and ethical course for society.

In a Policy Statement adopted

February 25, 1959, the National Council addressed the Christian Churches of the United States of America as follows:

> . . . Every organization must, on occasion, confront issues which test its purposes and try its values. Such an issue has now arisen. . . .
>
> It arises in the form of a series of challenges to a basic tenet of the National Council of Churches, stated most recently by the Church Board at its meeting of December 3-4, 1958. This concerns the right and duty of the Christian Churches and their Councils "to study and comment upon issues, no matter how controversial, in the realm of politics, economics and social affairs, in view of their common faith in Jesus Christ as both Lord and Savior. . . ."
>
> The issue is the right of the citizen of whatever race or creed, and of any peaceable organization he choose to form or join, to discuss freely and to express judgments, without exposure to attacks upon motive or integrity for daring to exercise the right to to so. Such a right is especially vital to the Church, which owes a duty to lead and to inform, so that its members may be aided in reaching morally valid judgments in the light of their common faith.
>
> . . . The right of free discussion becomes ever more essential, not as

> a private privilege but as a public necessity, and attacks upon it must be vigilantly resisted.
>
> NOW, THEREFORE, The General Board of the National Council of the Churches of Christ in the U.S.A. addresses this APPEAL to all of its constituent churches, related councils and organizations:
>
> 1. UPHOLD the right and duty of the churches and their councils to study and comment upon issues of human concern, however controversial. . . .
>
> --THE HARTFORD APPEAL, February 25, 1959

Its very constitution lists as one of the purposes of the National Council of Churches:

> 8. To study and to speak and act on conditions and issues in the nation and the world which involve moral, ethical and spiritual principles inherent in the Christian Gospel.

For all these reasons, the National Council of Churches submits this brief as a friend of the Court to urge affirmance of the order and opinion of the Court below.

INTRODUCTION

Since 1976, Congress has passed a series of enactments (referred to collectively herein as the "Hyde Amendment") limiting the use of Medicaid funds to pay for abortions. The precise terms of the Hyde Amendment have varied with each enactment. However, as demonstrated by the medical testimony reviewed in the district court's opinion and that court's unassailable findings, the net effect of the legislation has been to deny indigent women Medicaid funds to pay for therapeutic, medically necessary abortions except in those cases in which the life of the mother is imminently threatened.

At its broadest, the Hyde Amendment has permitted Medicaid benefits for abortions in three circumstances: (1) where the mother's life is endangered; (2) where the mother will suffer severe and long-lasting physical health damage; and (3) where the pregnancy is the result of rape or incest if it is promptly reported as such. Yet as the district court's findings of fact make plain, when superimposed upon the realities of medical practice and pregnancy, these criteria reduce to Medicaid benefits being available only for "crisis intervention" abortions (District Court Typewritten Opinion, hereinafter "Op.," at 110).

The life endangerment standard is medically meaningless (Op. at 91-99). There are a multitude of conditions which make termination of pregnancy medically advisable and which theoretically could be considered life

endangering but which the medical witnesses, nonetheless, did not feel they could certify as meeting the statutory standard. (Op. 96-97.) Furthermore, the delay required for protracted observation until professionally certifiable necessity is demonstrable itself creates an added threat to the health of the mother. (Op. 65-66, 113-16.)

The exception in the Hyde Amendment allowing Medicaid benefits for abortions when the mother is threatened with "severe and long-lasting physical health damage" also is medically meaningless. The district court found there was no class of definable instances in which this criterion would apply and that, when combined, with the requirement of certification of the condition by two physicians, it "would result in reducing certification to. . . the 'classic' life threatening conditions." (Op. at 100.)

Finally, the reporting requirements that accompany the rape and incest exception to the Hyde Amendment's prohibition "exclude a large part of rape victims from Medicaid coverage." (Op. at 151.)

In short, the Hyde Amendment effectively denies therapeutic abortions to indigent women except in the most extreme circumstances in which a demonstrable threat to the mother's life exists. Further, application of the criteria for Medicaid benefits to cover abortions will inevitably be arbitrary and equitable. As found by the district court:

> The teaching of the testimony as a whole, not excluding the testimony of the physicians presented as witnesses by the guardian, was that the Hyde-Conte Amendment could not be equal and uniform in interpretation and application, but that medical judgments under the amendment would necessarily reflect individual professional evaluations of conditions of inherently uncertain prognosis, that could occur in very different degrees of severity and with radically different degrees of access to supportive care, and could become manifest at widely different gestational ages and physiological, psychological, and social circumstances. More particularly significant was the very substantial risk that professional reluctance to certify under a standard alien to medical experience and terminology would deny medical assistance to women in instances in which it would not have been withheld under the older abortion committee standards.
>
> (Op. at 99-100.)

On the basis of the extensive record below, the district court found that the Hyde Amendment bore no rational relationship whatsoever to any legitimate governmental interest and constituted an impermissable and discriminatory violation of a woman's fundamental right to make a "conscientious decision, in consultation with her

physician, to terminate her pregnancy because that is medically necessary for her health." (Op. at 328.)

Amicus wholeheartedly endorse the result that the district court reached in this case. Amicus does not address herein all of the bases for the court's detetmination. Rather, amicus submit for this Court's particular consideration two issues evoked by the trial court's determination which amicus believes are uniquely presented by the facts of this case and which should be decided by this Court. Amicus submits (1) that the Hyde Amendment should be evaluated according to a standard of strict judicial scrutiny, and (2) that the Establishment Clause of the First Amendment is not implicated in this case.

ARGUMENT

I.

THE HYDE AMENDMENT VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

Amicus National Council of Churches has been at pains to assert the importance of the free exercise of religion in numerous cases before this Court, including Negre v. Larsen, 401 U.S. 437 (1970), Walz v. Tax Commission, 397 U.S. 664 (1969), Christian Exhoes National Ministry v. United States, 414 U.S. 864 (1973) Wisconsin v. Yoder, 406 U.S. 205 (1971) McDaniel v. Paty, 435 U.S. 618 (1978), and others. Of all the rights safeguarded by the Bill of Rights, there is none more important than those which stand first in the First Amendment: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."

If those words have any fundamental meaning, it is that government will not place obstacles in the way of its citizens' efforts to follow the dictates of conscience and religious obligation unless the most compelling of interests require it and can be subserved in no other way. In the view of amicus National Council of Churches, there are few interests of the State sufficiently compelling to justify the overriding of its citizens' conscientious scruples.

The subject of abortion is one which assumes a life-and-death

importance for many people, and among them are found views that are not only vehement but diametrically opposed. Religious teachings of profound depth and intensity on both sides of the issues are found in the "mainstream of the country's religious beliefs," as the court below concluded from the extensive testimony before it, and as amicus National Council of Churches can attest from the opposing views within its own membership. In a civil society where both views are broadly represented, the law should mandate neither the one nor the other, but should steer as nearly neutral a course between them as other important rights and interests make possible.

The fact that women have been held by this Court to have a right to obtain an abortion, at least during the first two trimesters of pregnancy (Roe v. Wade, 410 U.S. 113 (1973)), does not, of course, oblige society to fund the exercise of that right (Maher v. Roe, 432 U.S. 464 (1977)). But when society has erected a system of publicly-funded health-care for poor persons, pregnant women otherwise entitled to such health-care cannot constitutionally be denied access to a particular standard medical procedure when it is not only medical y advised to be necessary to the woman's health, but conscientiously chosen and sought.

In Sherbert v. Verner, 374 U.S. 398 (1963), this Court found that a woman could not be denied unemployment compensation because--for religious reasons--she refused jobs that would require her to work on her Sabbath. The Court so

ruled on the ground that such a policy would require her to choose between her religious scruples and public benefits to which she would otherwise be entitled. Sherbert v. Verner, supra, 374 U.S. at 404-406. The Court so held in reaffirmance of a principle enunciated fifteen years earlier, that the State may not "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any faith, because of their faith or lack of it, from receiving the benefits of public welfare legislation." Sherbert v. Verner, supra, 374 U.S. at 410, quoting from Everson v. Board of Education, 330 U.S. 1, 16 (1947) (emphasis in original).

The statutes at issue in Sherbert v. Verner, like the Hyde Amendment here, made no mention of any faith-groups by name. "Seventh-day Adventists" were not excluded from unemployment compensation, nor "Roman Catholics" from reimbursement for bus transportation. It was not their religious belief or their nominal adherence to a statutorily disadvantaged sect (which would, of course have been unconstitutional on the face of it), but the practice of their religion that effectively excluded them from public benefits for which their fellow-citizens qualified. Similarly, in this case, the practice of not only medically necessary but conscientiously implemented religious convictions would deprive pregnant poor women of benefits to which they would otherwise be entitled under a statute that appears religiously neutral on its face.

The courts have no higher duty than to determine when statutes seemingly neutral on their fact actually operate to disadvantage the free exercise of religion and then to remedy that disadvantage. Yick Wo v. Hopkins, 118 U.S. 356 (1886). The typical remedy for a claim of denial of free exercise of religion would be to exempt qualifying claimants from a law of general application (Sherbert v. Verner, supra, Wisconsin v. Yoder, supra), but because the court below struck down the discriminatory amendments on equal protection grounds as well, such an individualized remedy, with its difficult and sensitive test of sincerity, is avoided.

Thus amicus National Council of Churches supports the contention of appellees and the ruling of the trial court that the "Hyde Amendment" must be found to violate the "free exercise" clause of the First Amendment.

II.

THE ESTABLISHMENT OF RELIGION ISSUES NEED NOT AND SHOULD NOT BE ADDRESSED IN THIS CASE

Because the religious establishment clause issues raised in this case are unusually complex and because there are other and more obvious grounds on which the Hyde Amendment must be invalidated, amicus urgesthis Court to avoid the establishment issues altogether.

In any event, amicus applauds the district court's reaffirmation of the right of religious groups to participate fully in the political process and its reminder that "the healthy working of our political order cannot safely forego the political action of the churches, or discourage it." (Op. at 326.)

III.

THE HYDE AMENDMENT DENIES POOR WOMEN THEIR RIGHTS TO EQUAL PROTECTION AND DUE PROCESS

The Hyde Amendment effectively denies poor women who are eligible for Medicaid access to medically necessary abortions. The Amendment runs counter to our every concept of due process and equal protection. It operates to deny those individuals in our society who enjoy the least privacy -- the poor -- their fundamental right to privacy in making critical decisions of conscience concerning their health and their family.1/

1/ The liberty of conscience propounded herein, although often a component of religious belief, does not in and of itself give rise to the argument that the Hyde Amendment impedes the free exercise of religion guaranteed by the First Amendment to our Constitution. This Court has held that the pregnant woman's uninhibited decision on the issue of abortion during the early stages of pregnancy is within her constitutionally protected right to privacy, without reference to whether her religious beliefs are implicated. Roe v. Wade, 410 U.S. 113 (1973). Therefore, it is not necessary to address the question of free exercise of religion in this case.

The Hyde Amendment is further repugnant to the Constitution because it impedes the exercise of fundamental rights by and discriminates against a discrete, easily identifiable and traditionally disenfranchised segment of the population -- the poor, those whose indigency has forced them to and made them eligible for Medicaid. At the outset, the Amendment operates to the detriment of the poor as a discrete group because funds are withheld from them for elective abortions. More importantly, however, because poverty is a significant medical factor in the determination whether termination of pregnancy is a necessary and desirable health decision, the Hyde Amendment operates as an affirmative health burden which is imposed on the poor and only on the poor. And this burden attaches to the constitutionally protected decision whether to terminate pregnancy and not to any other health decision.

Because the Hyde Amendment burdens the exercise of fundamental rights of privacy and because its burden is imposed upon a suspect class, in order to sustain the Hyde Amendment the government must demonstrate that a compelling interest justifies the legislation and that it constitutes the least restrictive means of achieving such an interest. The government has not met that burden in this case. Indeed, as is evident from the record, Congress' express purpose to limit abortions by enacting the Hyde Amendment bears no rational relationship to this special burden imposed on the poor, and constitutes an unlawful attempt to legislatively override this Court's decision in

Roe v. Wade, 410 U.S. 113 (1973). Whatever legitimate fiscal and social considerations might be hypothesized for so limiting Medicaid benefits fail to justify the means employed by the Hyde Amendment. Ironically, any such considerations actually support a policy of Medicaid reimbursement for all therapeutic abortions.

In short, under any analysis, the Hyde Amendment constitutes a violation of the guarantees of Due Process and Equal Protection which lie at the core of our constitutional structure.

A. Strict Scrutiny Analysis Governs the Constitutional Evaluation of the Hyde Amendment.

As has been reiterated many times by this Court, whenever legislation burdens the exercise of a fundamental right or discriminates against a suspect class, the government carries a "heavy burden of justification" to demonstrate that the legislation is narrowly tailored to serve compelling government interests. See Dunn v. Blumstein, 405 U.S. 330 (1972) and cases collected therein. In this case, the challenged legislation both impinges on fundamental interests and discriminates against a suspect class. The confluence of these two constitutional invasions compels assessment pursuant to the strict scrutiny standard.

1. The Hyde Amendment Burdens the Exercise of Fundamental Rights.

Deeply enbedded in our national tradition is the fundamental constitutional interest in "making certain kinds of important decisions" free from governmental compulsion. Whalen v. Roe, 429 U.S. 589, 599-600 (1977). This theme emerges time and again in our literature, in the writings for example, of James Fennimore Cooper, Emerson, Thoreau, and Mark Twain, and in our legal heritage. The freedom "to be let alone" in making certain decisions is expressly guaranteed in the First Amendment to the Constitution (see Section I, supra), and emanates from the guarantees of the First, Fourth, Ninth and Fourteenth Amendments as a "penumbra, where privacy is protected from governmental intrusion." Griswold v. Connecticut, 381 U.S. 479, 514 (1965); Roe v. Wade, 410 U.S. 113, 152-53 (1973). See also, Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.")

In this case, the Court confronts the right to privacy as it pertains to the indigent poor, that group in our society which probably enjoys the least privacy. See, Wyman v. James, 400 U.S. 309 (1971); J. Handler and E. Hollingsworth, Stigma, Privacy and Other Attitudes of Welfare Recipients, 22 Stan.L.Rev. 1, 2 (Nov. 1969) ("Disclosing assets and

resources, revealing the names of one's friends and associates, submitting to investigations and questionings, accounting for expenditures and social behavior -- these are the price of receiving welfare.")

The significance of the right to privacy in the abortion context was settled by this Court in Roe v. Wade, 410 U.S. 113 (1973), where it concluded that the right to privacy, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Roe v. Wade, supra, 410 U.S. at 153, Colautti v. Franklin, 439 U.S. 379, 386 (1979). In Maher v. Roe, 432 U.S. 464 (1977), the Court reaffirmed "the fundamental right recognized in Roe," (432 U.S. at 474), but found that the limitations of funding of non-therapeutic abortions at issue there did not impermissibly impinge on the exercise of this fundamental right to choose an abortion.

The legislation at issue here, unlike the regulation at issue in Maher denies Medicaid funding for therapeutic or "medically necessary" abortions.2/

2/ Maher and its companion cases, Beal v. Doe, 432 U.S. 438 (1977) and Poelker v. Doe, 432 U.S. 519 (1977), all involved non-therapeutic abortions and turned on the state's interest in "normal childbirth." This case, in contrast, involves therapeutic abortions in situations where "normal childbirth" is unlikely if not impossible.

It thus impinges on one of a woman's most personal and precious privacy interests, maintenance of her own health and life. The effect of the Hyde Amendment thus is affirmatively to penalize poor women medically in need of abortions who wish to attempt to exercise their constitutionally protected right to terminate a health-threatening pregnancy rather than their constitutionally protected interest in carrying the fetus to term.3/ The sole determinant for the withholding of Medicaid funds is the decision to abort, a constitutionally protected choice. The consequences of this decision on the indigent woman in need of a therapeutic abortion and on her family, as documented in the district court's findings, are immediate and severe. If she chooses to carry the fetus to term, she risks serious, sometimes permanent physical debilitation (Op. at 105-10); she often is faced with psychological stress, imbalance and disorder -- perhaps to the point of chronic psychological disability (Op. at 111-13, 116-23); she hazards her continuing ability to perform within society and within the family as a wage earner, a homemaker, a mother, a wife; and, even assuming "normal childbirth," she faces all those

3/ Maher v. Roe, 432 U.S. 464, 472 n.7: "A woman has at least an equal right to choose to carry her fetus to term as to choose to abort it."

difficulties confronting an indigent family with an additional child, difficulties which may have forced the mother to seek an abortion in the first place.4/ On the other hand, if she chooses to seek an illegal abortion within her limited financial means, she plays Russian Roulette with her health and her life. (Op. at 74-75; Roe v. Wade, supra, 410 U.S. at 148-49.)

The individual's interest in medical care as a "basic necessity of life" already has been recognized by this Court. Memorial Hospital v. Maricopa County, 415 U.S. 250, 259 (1974). "And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater significance than less essential forms of governmental entitlements." Ibid. When the denial of government funds for necessities such as medical care and welfare bears a close relationship to the exercise of an otherwise protected constitutional right, that denial constitutes an impermissible burden or penalty on the exercise of the constitutional right, absent a compelling government interest in the funding regulations. Memorial Hospital v. Maricopa County, supra, 415 U.S. at 256-59; Shapiro v. Thompson, 394 U.S. 618, 638 (1969); Sherbert v. Verner,

4/ It cannot be assumed that this final contingency can be avoided by the practice of birth control. As found by the district court in its review of the evidence, abortion decisions sometimes arise precisely because birth control practices failed to prevent conception. (See e.g. Op. at 117, 118.)

374 U.S. 398, 403-404 (1963). Cf. Speiser v. Randall, 357 U.S. 513, 518 (1958) (Discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech.) Hannegan v. Esquire, Inc., 327 U.S. 146, 156 (1946) (Second class mail rates may not be granted or withheld on the basis of whether certain economic or political views are disseminated.)

Here, the denial of Medicaid benefits for therapeutic abortions effectively prohibits indigent women from exercising their constitutional right to make critical decisions regarding their pregnancy and their health. In light of its harsh consequences, to label this withholding of funds as anything other than a penalty on the decision to abort in the therapeutic context would be disengenuous to the extreme -- especially since this Court has held that medical care "is a basic necessity of life." Memorial Hospital v. Maricopa County, supra, 415 U.S. at 259.

Because the Hyde Amendment operates to penalize the exercise of indigent women's decision whether to abort in the therapeutic context, the government carries a "heavy burden" of showing that the legislation is the least restrictive means of achieving compelling government interests. This burden has not been met.

2. The Hyde Amendment Discriminates Against a Suspect Class.

In United States v. Carolene Products Co., 304 U.S. 144 (1938), the Court, through Chief Justice Stone, first adverted to the criteria by which suspect classifications which trigger a stricter judicial scrutiny of government acts may be identified. The Court reserved the question "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Carolene Products, supra, 304 U.S. at 152-53, n.4.

Since Carolene Products, the doctrine of suspect classification and the strict scrutiny which accompanies it have become well established. Nor has this doctrine been limited to racial classifications. As stated by the Court in Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966), "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." (citation omitted). See also, McDonald v. Board of Elections, 394 U.S. 802, 807 (1969) ("[A] careful examination on our part [of voting restrictions] is especially warranted where lines are drawn on the basis of wealth or race, two factors which independently render a classification highly suspect and thereby demand a more

exacting judicial scrutiny") (citations omitted). An individual's status as an indigent simply does not provide a reason for denying him or her rights and privileges of United States citizenship, Edwards v. California, 314 U.S. 160, 184-85 (1941) (Jackson, J. concurring).

In San Antonio School District v. Rodriquez, 411 U.S. 1, 22-23 (1973), this Court propounded a two-step inquiry for determining whether strict scrutiny shall apply to alleged wealth classifications: first, does the government practice "operate to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level," and second has the "lack of personal resources...occasioned an absolute deprivation of the desired benefit." (411 U.S. at 22-23). In Rodriquez, the Court declined to engage in a strict scrutiny analysis of the Texas school financing system because neither of these elements was shown to be present. Both elements are evident in the case at bar.

The class of indigent individuals denied access to medically necessary abortions under the Hyde Amendment is easily identifiable. They are defined by the standards for Medicaid eligibility. See 42 U.S.C. § 1396a. Nor can there be any doubt that these individuals are indigent. The very purpose of the Medicaid program is "to furnish medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet

the costs of necessary medical services." 42 U.S.C. § 1396.

The impact of the Hyde Amendment in absolutely denying these poor individuals necessary medical assistance is equally apparent. The standards set forth in the Hyde Amendment are so vague and uncertain that the Amendment operates to deny Medicaid funding for abortions except in the most extreme circumstances in which the mother's life is demonstrably endangered. See pp. 6 to 7 , supra. Notably, the delay necessary in many cases for protracted observation before a doctor can certify danger to the mother's life itself creates an added threat to the health of the mother. 5/ Moreover, because of the vagueness of the criteria embodied in the Hyde Amendment, its application to permit and deny abortion funding inevitably will be arbitrary and capricious. (Op. at 99-100).

The Hyde Amendment has enacted an absolute prohibition of needed therapeutic abortions for poor people in the vast number of cases in which they are medically advisable. It effectively overrules this Court's decision in Roe v. Wade, but only as to a discrete class in our society --

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5/ In Roe v. Wade, this Court held that the health of the mother is a compelling state interest justifying regulation of abortions during the second trimester. Surely it is no less compelling when asserted by the mother rather than by the State.

indigent women.

The discriminatory impact of the Hyde Amendment is enhanced by the fact that poverty is a plainly identifiable medical factor which makes pregnancy more threatening to the health of indigent women. 6/ The Hyde Amendment denies medically necessary abortions to the very group which needs them most -- poor women, whose health is most often and most seriously threatened by carrying a child to term -- and increases the health burden these women already suffer. It represents the abstract aloofness and insensitivity to reality caricatured by Anatole France:

> The law, in its majestic equality, forbids all men to sleep under bridges, to beg in the streets, and to steal bread -- the rich as well as the poor.
>
> Anatole France, Crainquebille

6/ The district court made extensive factual findings regarding the significance of poverty as a medical factor in the abortion decision (Op. at 101-110, 123-24), culminating in this statement:

> Poverty is itself, and persistently, a medically relevant factor; it takes its toll on pregnant women's general health and in the heightening of the health risks of pregnancy. (Op. at 160).

The injustice of the situation is even more appalling when one considers that these women are afforded Medicaid benefits for numerous medically necessary procedures including child birth and some abortions, but are denied benefits for the vast majority of clearly therapeutic and "medically necessary" abortions. 7/

There can be no question that under the Hyde Amendment, indigent women are "saddled with such disabilities,... or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio School District v. Rodriquez, supra, 411 U.S. at 28. The Hyde Amendment cannot withstand the close judicial scrutiny which this situation demands.

7/ The classification created by the Hyde Amendment may be defined alternatively as a distinction between (1) abortions where the mother's life is endangered and other medically necessary abortions; (2) abortions on the basis of rape or incest and therapeutic abortions; or (3) therapeutic abortions and other necessary medical procedures. Regardless of how the lines are drawn, however, the class against whom the Hyde Amendment discriminates is easily identifiable. It consists of indigent women medically in need of abortions.

B. The Hyde Amendment Cannot Withstand Any Form of Constitutional Scrutiny

The district court found that the Hyde Amendment could not be sustained even under the less demanding rational relationship test. (Op. at 316-23.) In reaching this conclusion, the court did not need to speculate as to the legislative purpose underlying the enactment. The impermissible attempt to override this Court's constitutional decision in Roe v. Wade, 410 U.S. 113 (1973) was apparent from the Congressional debates. As stated by the district court: "the dominant purpose inferable was to prevent exercise of the right to decide to terminate pregnancy, to prevent the funds of taxpayers who disapproved of abortion on moral grounds from being used to finance abortions that were abhorent to them." (Op. at 318.)

Nor is it possible to hypothesize any legitimate interest served by this legislation. Unlike Maher v. Roe, 432 U.S. 464 (1977) and its companion cases, there is no interest in "normal childbirth" implicated here.

This Court consistently has rejected fear of fraud as a justification in cases such as this for limiting government aid to the poor. See Shapiro v. Thompson, 394 U.S. 618, 637 (1969). Further, as the district court noted: "Fear of fraud on Medicaid, of feigned pschiatric problems, can hardly justify excluding a whole field of health damage from appropriate treatment." (Op. at 322.)

Finally, fiscal considerations -- which apparently played no part in the enactment of the Hyde Amendment -- weigh against the validity of the Amendment. Medicaid continues to pay for childbirth, so there is no financial saving overall. Further, to the extent the Hyde Amendment requirements inhibit medically necessary abortions, there will be more medical complications in pregnancy and childbirth among indigent women which, in turn, will increase the Medicaid bill. Even where an abortion ultimately is performed, the delay necessary for physicians to certify danger to the mother's life or severe and long-lasting physical injury virtually assure additional complications in the pregnancy and its termination which require greater Medicaid spending. The costs of caring for indigent women who, as a result of illegal abortions, suffer medical complications also, necessarily, are more expensive than a legal abortion.

In short, the Hyde Amendment is wholly irrational when measured against legitimate (and constitutional) government interests. It fails to survive constitutional scrutiny under the least demanding test, let alone under the strict judicial scrutiny which should apply in this case.

CONCLUSION

This Court long has been faithful to the "duty of the judicial department to say what the law is," regardless of legislative views to the contrary. Marbury v. Madison, 1 Cranch 137, 178, 2 L.Ed. 60, 73 (1803). In this case, the legislature impermissibely has attempted to usurp this Court's constitutional authority and partially resolve the abortion debate in the context of an appropriations bill rather than in the constitutional forum. This illegitimate effort is especially tainted because it violates the Free Exercise clause of the First Amendment and denies the indigent -- a peculiarly needy and disadvantaged group -- their fundamental right to privacy in making decisions of conscience essential to their health, well-being and family. The district court did not err in finding the Hyde Amendment fatally unconstitutional.

Respectfully submitted,

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